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No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals, Division I,
For The State Of Oklahoma

BRIEF OF THE NAVAJO NATION, THE NAVAJO NATION OIL AND GAS CO., INC., THE NAVAJO AGRICULTURAL PRODUCTS INDUSTRY, AND THE MISSISSIPPI BAND OF CHOCTAW INDIANS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Navajo Nation is a federally recognized Indian nation with 225,000 citizens and a territory of over 25,000 square miles in the southwestern United States. The Navajo Nation entered into two treaties with the United States under which the United States agreed to protect Navajo self-government and to promote the well-being of the Navajo people. The Navajo Nation established the Navajo Nation Oil and Gas Company (NOG) and the Navajo Agricultural Products Industry (NAPI) in order to provide needed revenues to the Navajo Nation and to alleviate the high unemployment and crushing poverty of the Navajo people. NAPI employs Navajo tribal members and others on lands outside formal reservation boundaries provided by Congress for the 110,630-acre Navajo Indian Irrigation Project. *See* Act of June 13, 1992, Pub. L. No. 87-482, 76 Stat. 96. In 1993, the Navajo Nation Council authorized the incorporation of NOG under the Navajo Nation Corporation Act, 5 Navajo Nation Code ("N.N.C.") §§ 3100-3186 (1995), as a wholly-owned instrumentality of the Nation.[2] All profits of NOG are

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

[2] In establishing NOG, the Navajo Nation Council responded directly to Congress' encouragement of the formation of vertically integrated energy ventures. *See* 25 U.S.C. § 3503 (1995).

required by Navajo law to be devoted exclusively to essential governmental services.

The Navajo Nation statutorily waived its sovereign immunity for certain purposes and has established means by which its sovereign immunity may be waived further. *See* Navajo Sovereign Immunity Act, 1 N.N.C. §§ 551-555 (1995); 5 N.N.C. § 1636 (1995) (authorizing NAPI to waive sovereign immunity). Generally, claims against the Navajo Nation must be filed in the Navajo Courts, but NOG is authorized to waive its immunity from suit in any court after 30 days' notice to the Council.

The Mississippi Band of Choctaw Indians is a federally recognized Indian tribe whose citizens live in the aboriginal Choctaw territory. Prior to 1979, the Tribe had no industrial development and an unemployment rate of 75%. Living conditions were deplorable. However, in the 1980s the Tribe began to pursue an aggressive business development strategy. Today, tribal unemployment is below 20% and per capita income has doubled. *See* Fergus M. Bordewich, "How to Succeed in Business: Follow the Choctaws' Lead," *Smithsonian Magazine* (March 1996). Tribal immunity of the Choctaw Tribe is covered in §§ 1-2-6, 1-5-1 and 1-5-5 of the Choctaw Tribal Code. The Tribe's sovereign immunity has not impeded tribal self-sufficiency or economic development but is, quite simply, an issue dealt with routinely in contract negotiations. The Tribe's growth is the result of a carefully formulated tribal strategy for balanced community and economic development, building on its reservation land base and operating under tribal, rather than state, regulatory and adjudicatory jurisdiction.

Amici curiae have established solid business relationships with people and entities who live or do business

outside Indian country. *Amici curiae* have relied on the prior decisions of this Court that hold that, although an Indian tribe may waive its sovereign immunity, only Congress, and not the States, may abrogate tribal sovereign immunity.[3] Were the views of the Oklahoma Court of Appeals adopted here, the contractual expectations of *amici curiae* would be upset and tribal self-determination threatened. Indeed, if the approach of the Oklahoma courts in the Kiowa cases were upheld, the States could accomplish as a practical matter the goal of tribal termination that Congress has repeatedly repudiated.

SUMMARY OF ARGUMENT

Indian tribes are domestic, dependent nations. They are not foreign states, nor are they subordinate to the several States.

Under the Constitution, Congress has exclusive authority to regulate commerce with the Indian tribes. Only Congress may abrogate tribal sovereign immunity. Because of the general impoverishment and the lack of banks and other economic institutions in Indian country,[4]

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[3] There is no suggestion in this case that the Kiowa Tribe waived its immunity; rather, the record shows that the Kiowa expressly preserved its sovereign rights in the contract at issue. Thus, this brief deals only with abrogation of tribal sovereign immunity.

[4] *See* President Reagan's 1983 Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 100 (1983) ("Tribes have had limited opportunities to invest in their own economies, because often there has been no established resource base for

practically all tribal transactions of any significance have some off-reservation component. Oklahoma's extra-constitutional abrogation of tribal sovereign immunity gravely threatens Congress' "goals of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

The court below ignored settled law and federal policy simply to provide relief to one of its corporate citizens, who deliberately entered into what turned out to be an improvident transaction. This Court, in essence, already rejected the views of the Oklahoma courts in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). This Court should reverse.

ARGUMENT

I. ONLY CONGRESS MAY ABROGATE TRIBAL SOVEREIGN IMMUNITY.

Under the Constitution, Congress is delegated the power to "regulate commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The Constitution distinguishes Indian tribes from foreign states, but not "because a tribe may not be a nation, but because it is not foreign to the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.)

community investment and development. Many reservations lack a developed physical infrastructure, including utilities, transportation, and other public services.")

1, 19 (1831). Tribes are obviously not states,[5] and the relationship between the tribes and states lacks the "mutuality of concession" that makes plausible an implicit surrender of either's sovereign immunity in the other's courts. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

"The states have traditionally been hostile to the tribes. . . . " Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1077 (1982). "Because of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). The tribes are under the protection of the United States and may "not be subjected to the laws of the State *and the process of its courts*." *Id.* (emphasis added). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

Indian tribes are sovereigns. *Blatchford*, 501 U.S. at 780. Tribal sovereign powers "are not, in general, delegated powers granted by express acts of Congress, but rather *'inherent powers of a limited sovereignty, which has never been extinguished.'* " *Felix S. Cohen's Handbook of Federal Indian Law* 231 (R. Strickland et al. eds. 1982) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (emphasis in original)). One component of that original sovereignty is the tribes' immunity from suit. *See e.g.*

[5] *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512-13 (1940).

Under the Constitution, Congress, not the Executive branch or the federal courts, exercises the United States' exclusive authority to regulate commerce with the Indians. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). ("Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). Thus, Congress – and only Congress – may abrogate an Indian tribe's sovereign immunity. *E.g., Turner v. United States*, 248 U.S. 354, 358 (1919).

This has been the law and the settled policy of the United States since the beginning of the Republic. *See generally Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-63 (1832) (per Marshall, C.J.); *id.* at 591-92 (analogizing exclusivity of federal power to regulate intercourse with Indian tribes with that respecting powers to coin money and to enter into treaties with foreign nations) (per M'Lean, J.). In *Thebo v. Choctaw Tribe*, 66 F. 372 (CCA 8 1895), the court affirmed the dismissal of an action against the Choctaw Tribe in federal court. The court observed that "no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case." *Id.* at 374. The court reasoned:

> As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it.

Id. at 376.

Thebo was extended in *Adams v. Murphy*, 165 F. 304 (CCA 8 1908), which held that allowing an action for damages to be brought against the Creek Nation's Principal Chief would be "to destroy in practice the very exemption [tribal sovereign immunity] which at the outset is conceded as a legal right." *Id.* at 308. The court again observed that "the settled doctrine of the government from the beginning" has been to "exempt from civil suit" the Indian tribes. *Id.*

Justice Brandeis, writing for a unanimous Court in *Turner v. United States*, 248 U.S. 354 (1919), stated most plainly, "[w]ithout authorization from Congress, the [Creek] Nation could not then have been sued in any court; at least, without its consent." *Id.* at 358. In *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), the Court once again declared unambiguously: "[t]hese Indian nations are exempt from suit without congressional authorization." *Id.* at 512 (footnote omitted). "[T]he suability of . . . the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authorization." *Id.* at 514. *Fidelity & Guaranty* voided the judgment of a federal court insofar as it purported to "fix a credit against the Indian nations" even though complete relief was unavailable in any other forum. *Id.* at 512-13. *Thebo, Adams, Turner,* and *Fidelity & Guaranty* all arose in Oklahoma (or Indian Territory in what later became the State of Oklahoma).

Modern cases are in accord. In *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165 (1977), the Court reviewed a state court judgment concerning the regulation of "fishing activities of the Tribe *both on and off its reservation*." *Id.* at 167 (emphasis added). Despite the off-reservation conduct, this Court reversed the judgment with respect to the tribe, upholding its sovereign immunity from suit. *Id.* at 172-73. One year later, the Court ruled in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), that the Indian Civil Rights Act could not be interpreted to authorize civil actions even for declaratory and injunctive relief, stating that " 'without congressional authorization,' the 'Indian Nations are exempt from suit.' " *Id.* (quoting *Fidelity & Guaranty*, 309 U.S. at 512).

In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986), the Court held that a state could not condition the availability of its courts on tribal consent to suit in all civil actions brought against the tribes in state courts, because "those statutory conditions may be met only at an unacceptably high price to tribal sovereignty." *Id.* at 889. The Court explained that "tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the State." *Id.* at 891. Finally, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, this Court addressed essentially the same issue that is presented here:

> At the very least, Oklahoma proposes that the Court modify *Fidelity & Guaranty*, because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context. The sovereignty doctrine, it maintains, should be limited to the tribal courts and the internal affairs of the tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws.

498 U.S. 505, 510 (1991). This Court rejected Oklahoma's position because, although "Congress has always been at liberty to dispose with such tribal immunity or to limit it . . . Congress has consistently reiterated its approval of the immunity doctrine." *Id.* Relying on *Fidelity & Guaranty*, the Court held that a tribe's sovereign immunity protected it from even the assertion of a compulsory counterclaim by a state agency. *Id.* at 509-10.

II. CONGRESS HAS NOT AUTHORIZED STATE COURTS TO ADJUDICATE CLAIMS BROUGHT AGAINST INDIAN NATIONS.

Congress was delegated the authority to "regulate Commerce with foreign Nations . . . and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Congress has exercised this authority by statute. With respect to sovereign immunity, Congress has treated Indian tribes quite differently than foreign nations, preserving intact the tribes' sovereign immunity while abrogating that of foreign sovereigns which engage in extra-territorial commercial activities.

"Congress knows how to limit the sovereign immunity of others when it wants to." *In Re Greene*, 980 F.2d 590, 594 n.3 (9th Cir. 1992), *cert. denied sub nom. Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994). In the Foreign Sovereign Immunity Act of 1976 ("FSIA"), Congress

exempted commercial activities of foreign states having a direct effect in the United States from the general conferral of immunity from state court process. *See* 28 U.S.C. § 1605. Congress has also abrogated tribal sovereign immunity in rare instances. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. at 71 (Congress provided federal court review only in habeas corpus proceedings under the Indian Civil Rights Act). "But, for obvious reasons, this power has been sparingly exercised." *Thebo v. Choctaw Tribe*, 66 F. at 375.[6]

In fact, as this Court observed in *Potawatomi*, "Congress has consistently reiterated its approval of the [tribal] immunity doctrine." 498 U.S. at 510. In 1934 Congress preserved "all powers vested in any Indian tribe . . . by existing law" in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476(e), and in 1936 Congress extended the policies of the IRA to Oklahoma tribes in the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501-509. Congress enacted the OIWA to "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]." H.R. Rep. No. 2408, 74th

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[6] In the Indian Reorganization Act of 1934, Congress authorized the creation of tribal *corporations* for the conduct of business activities. Notably, those tribal corporations were given the ability, but were not required, to include "sue or be sued" language in their corporate charters. Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87, 101 (1996). The option of establishing tribal corporations without "sue and be sued" clauses was extended by Congress to non-IRA tribes in 1990. *See* 25 U.S.C. § 478-1.

Cong., 2d Sess. (1936); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443-46 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). As shown above, the doctrine of tribal sovereign immunity, in Oklahoma and elsewhere, was firmly established when the IRA and OIWA were enacted, and even foreign states enjoyed "absolute immunity" in United States courts for their extra-territorial commercial activities then. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926); Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 Colum. L. Rev. 1086, 1087 (1965). *See also Powers of Indian Tribes*, 55 Interior Dec. 14, 24 (1934) (citing *Turner v. United States*, 51 Ct. Cl. 125 (1916), *aff'd*, 248 U.S. 354 (1919)).[7]

Indeed, at about the same time as it passed the FSIA, Congress preserved fully the tribes' sovereign immunity from suit. In effectuating President Nixon's "self-determination without termination" policy,[8] Congress passed the Indian Self-Determination and Education Assistance Act of 1975, which provided that "[n]othing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe. . . . " 25 U.S.C. § 450(n)(1).[9]

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[7] Plainly, Congress has not waived generally the sovereign immunity of the *United States* in state courts, in cases involving Indians or otherwise. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 388-89 (1939).

[8] Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 565.

[9] The Indian Self-Determination and Education Assistance Act is but one of several recent statutes declaring Congress' commitment to Indian self-sufficiency and self-determination. 25 U.S.C. § 450a(b). *See* Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(2) ("the United States has a trust responsibility

Congress has not seen fit to abrogate tribal sovereign immunity for tribal commercial activities that may have off-reservation connections. It clearly has the power to do so. "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60. This requirement of a clear statement from Congress honors the allocation of federal power in Article I, § 8 of the Constitution, with lasting structural and practical benefits. *See* Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993).

III. THE DECISION OF THE COURT BELOW LACKS ANY SUBSTANTIAL SUPPORT.

The issue before the Court is whether State courts may abrogate tribal sovereign immunity on an *ad hoc* basis where Congress has affirmatively preserved intact that feature of tribal sovereignty. The court below held that it had that power.

The holding of the Oklahoma Court of Appeals is contrary to the great weight of authority. The decision below ultimately rests on *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), a

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to each tribal government that includes the protection of the sovereignty of each tribal government"); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal government").

decision that even New Mexico courts are beginning to question. *See DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1067-68 (N.M. App.) (distinguishing *Padilla* and embracing the reasoning of *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995)), *cert. denied*, 903 P.2d 844 (N.M. 1995).

Padilla held that "the exercise of [state court] jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." 754 P.2d at 850. It came to this startling conclusion in reliance on *Nevada v. Hall*, 440 U.S. 410 (1979), a case involving the assertion of sovereign immunity by one State in the courts of a sister State. *Hall* is inapposite, because

> [w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with . . . Indian tribes.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (fundamental differences in the nature of tribal and state sovereignty make it "treacherous" to apply to tribes principles developed in cases involving states). *Padilla* has been roundly criticized by courts and commentators alike:

> *Padilla* is flawed for the basic reason that the New Mexico Supreme Court erred by incorrectly applying *Nevada v. Hall* in the context of tribal immunity. The decision in *Nevada v. Hall* narrowly addresses the issue of sovereign immunity between the states and does not contain any language signalling an intent to extend its analysis to Indian tribes. The sovereign

> immunity of states and tribes derives from different sources, and while large, financially secure states no longer require the protection of sovereign immunity, this immunity still remains a very important tool used by Indian tribes to protect their scarce resources.

Lake, *supra* n.6, at 108 (footnotes omitted); *In Re Greene*, 980 F.2d at 593-95.

Not one federal court that has addressed the issue before the Court has agreed with either the reasoning or the outcome of the court below. *See In Re Greene* (criticizing *Padilla* and upholding tribal sovereign immunity in off-reservation commercial context); *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063-65 (10th Cir.) (adopting reasoning of *Greene* and holding that "the extra-territorial nature of [the] transactions does not strip the [Sac & Fox] Nation of its right to assert sovereign immunity"), *cert. denied*, 116 S.Ct. 57 (1995); *Federico v. Capital Gaming Int'l Inc.*, 888 F. Supp. 354, 357 (D.R.I. 1995) (quoting *Hanson*); *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E. D. Tex. 1994) (immunity upheld where tribal bank officer allegedly defrauded plaintiff outside Indian country), *aff'd*, 102 F.3d 549 (5th Cir. 1996). *See also Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir.) ("The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such

need. . . . To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians."), *cert. denied*, 385 U.S. 918 (1966); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378-79 (8th Cir. 1985) (tribe's sovereign immunity not waived by virtue of engaging in business); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993) (declining to weigh several factors to infer a tribe's waiver of sovereign immunity).

No state court agrees with the court below, either, except perhaps the New Mexico courts. *See DeFeo*, 904 P.2d at 1067-68. The State courts recognize that congressional action is required if tribes are to be stripped of their sovereign immunity, even in the context of commercial disputes arising outside of Indian country. *See North Sea Prods., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (*en banc*) (upholding tribal immunity against state court garnishment action in context of tribal commercial enterprise outside reservation boundaries); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290 (Minn. 1996) (upholding tribal immunity where tribe's commercial activity took place both within and outside Indian country), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. Jan. 29, 1997) (No. 96-1215); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (upholding tribal immunity from suit for damages arising from accident at tribe's off-reservation

amusement park).[10] *See also Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 363 (Okla. 1996) (Summers, J., dissenting) (if the result of the Kiowa cases "were based on the desire to make business dealings with tribes more fair and equitable, such a remedy should and could be fashioned by the United States Congress, not this Court.").

Hoover v. Kiowa Tribe of Oklahoma, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996), was the first case decided by the Oklahoma Supreme Court concerning tribal sovereign immunity in the commercial context.[11] *Hoover*'s discussion of tribal sovereign immunity begins with quotations of isolated passages from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). *Hoover*, 909 P.2d at 61. Neither case concerns tribal sovereign immunity. *Jones* affirmed the imposition of state gross receipts taxes

[10] Arizona courts typically honor the sovereign immunity of tribes and tribal corporations in the commercial context. *See Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. App. 1983) (farming company immune); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971) (timber company immune). One case holding otherwise employed a test (the "subordinate economic organization" test) described as "an even worse option" than that used in *Padilla*. Lake, *supra* n. 6, at 109, criticizing *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989).

[11] *Hoover* noted *Lewis v. Sac and Fox Tribe of Okla. Housing Auth.*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476 (1995), but conceded that the tribal entity in *Lewis* had specifically abandoned its immunity-based challenge to state court jurisdiction. *Hoover*, 909 P.2d at 61 (citing *Lewis*, 896 P.2d at 511).

on a tribe's ski resort located wholly outside of reservation boundaries, but an act of Congress specifically authorized such taxes. 411 U.S. at 149-50. Moreover, later decisions of this Court make clear that, even if state law applies to a tribe, the states may not be able to sue the tribes directly – "the most efficient remedy" – to enforce state law. *Potawatomi*, 498 U.S. at 514.

Hoover ultimately relies on *Padilla* – a most slender reed, as shown above. Later Oklahoma cases offer a variety of additional justifications, set forth below, for departing from settled law.[12] None withstand scrutiny.

1. *Denial of Certiorari.* In *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) (*"Aircraft Equip. I"*), the following passage appears. "We follow the jurisprudence of *Hoover* and *Lewis* because in both cases certiorari was denied by the Supreme Court of the United States." *Id.* at 361. The court failed to recognize that the denial of certiorari "imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

2. *Professed Solicitude for the Indians. Aircraft Equip. I* also found "important public policy considerations" to support the Oklahoma decisions, to wit: if sovereign immunity were upheld, "the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and

[12] One subsequent decision, *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299 (Okla. 1996), engaged in no legal analysis and simply held that *Hoover* was dispositive. *Id.* at 301.

entrepreneurial business." 921 P.2d at 362. *Amici curiae* have experienced no such chilling effect. In an analogous setting, the Tenth Circuit has exposed this rationalization of *Aircraft Equip. I* for what it is.

> The Bank next argues that commercial relations between Indian tribes and non-Indian banks will be chilled if the district court's dismissal [for failure to exhaust tribal remedies] is affirmed. This policy argument precisely misses the point of sovereign immunity, which is the power of self-determination. We decline the Bank's invitation to second-guess the wisdom of the Nation's business decisions under the guise of judicial review.

Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992); *see also Hanson*, 47 F.3d at 1064. Oklahoma's policy consideration is, at best, misguided paternalism. *See* Presidential Comm'n on Indian Reservation Economies, *Report and Recommendations to the President of the United States*, Part 2 at 31, 115, 121 (1984) (from a "private sector business perspective" sovereign immunity is considered a "problem which the teams discovered low on the list of priorities. . . . As noted above, the teams found the lack of good business plans, a shortage of entrepreneurs, and insufficient attention to cash flows to be of far more importance to banks and other investors than questions of collateral."). Indeed, as this Court has noted, "the perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances. . . . " *Three Affiliated Tribes*, 476 U.S. at 893. Tribes and persons

dealing with them have long been able to effect a valid waiver of tribal sovereign immunity when they so desire. *See e.g. McClendon v. United States*, 885 F.2d 627, 631-32 (9th Cir. 1989); *American Indian Agric. Credit Consortium Inc.*, 780 F.2d at 1378-79.

Disputes such as the instant one would literally destroy many small tribes. *See Report and Recommendations to the President of the United States*, Part 1 at 29 ("Approximately 35% of all Indian reservations and Alaskan villages have fewer than 100 resident members."). In the instant case, total state court judgments against the Kiowa Tribe are said to exceed $1.5 million. Oklahoma process is being employed to seize Kiowa tax revenues and federal judgment funds. The warning of *Thebo* should be heeded: an Indian tribe, regardless of its possible wealth, "will soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it." 66 F. at 376.

3. *The "state law" basis.* The confusion of the Okahoma courts is exemplified in the characterization of the issue of tribal sovereign immunity as a "state law question." *Aircraft Equip. I*, 921 P.2d at 361. To the contrary, such issues are most assuredly federal law issues. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Tribal sovereign immunity "is subject to the superior and plenary control of Congress."); *Three Affiliated Tribes*, 476 U.S. at 891 ("[I]n the absence of federal authorization, tribal immunity . . . is privileged from diminution by the States."); *see generally County of Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

4. *The "Unique History" of Oklahoma.* In *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma, et al.*, No. 86,184, 1997 WL 222406 (Okla. May 6, 1997) (*"Aircraft Equip. II"*), the court added another justification for its decisions – the "unique history in regard to relations with Indian tribes within [Oklahoma's] boundaries;" *Aircraft Equip. II*, 1997 WL 222406, at *7 n.6, citing Oklahoma's Organic Act and the Curtis Act. Neither act supports distinguishing Oklahoma tribes from other tribes. The Indian disclaimer provisions of Oklahoma's Enabling Act are practically identical to those of the other western states. *See Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) ("Since statehood, the status of Indian tribes in Oklahoma has been similar to that of tribes in other states."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 & n. 4 (1973); *Adams v. Murphy*, 165 F. 304, 312 (CCA 8 1908) (Curtis Act not intended to abolish tribal sovereign immunity). *See also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (OIWA impliedly repealed Curtis Act), *cert. denied*, 488 U.S. 1010 (1989).

CONCLUSION

Only Congress may abrogate tribal sovereign immunity under the Constitution. The Indian Commerce Clause divests the States "of virtually all authority over Indian commerce." *Seminole Tribe v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1126 (1996) and *id.* at 1168 ("the States have no sovereignty in the regulation of commerce with the tribes") (Souter, J., dissenting). No act of Congress has divested the Kiowa Tribe of its sovereign immunity from the exercise of state court jurisdiction in commercial or

any other disputes. The decision below must therefore be reversed.

Respectfully submitted,

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